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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETERSON PAINTING, INC.
Petitioner/Cross-Respondent
vs.
NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
MEMORANDUM*

Petition for Review of National Labor Relations Board
(Argued and Submitted November 12, 1986 - San Francisco)

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

Peterson Painting, Inc. appeals a National Labor Relations Board order requiring it to reinstate certain employee benefit plans, bargain with the union and make employees whole. The Board cross-appeals for enforcement of its order. The Board found that Peterson withdrew recognition from the union, unilaterally changed terms and conditions of employment, and constructively discharged six employees, all in violation of the National Labor Relations Act (the Act), 29 U.S.C. Sec. 158(a)(1), (3) and (5). Peterson contends that the Board's order is punitive, inequitable and beyond its remedial scope.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Peterson is a residential painting contractor. From 1971 to 1983, it was a member of the Painting and Decorators Contractors Association of Central Coast Counties (PDCA), a multi-employer bargaining group. Peterson's painting employees were represented by District Council of Painters No. 33 and were covered by the collective bargaining agreements between District 33 and the PDCA.

On December 8, 1982, Peterson timely withdrew from the PDCA. It also advised District 33 that it would terminate the PDCA contract when it expired on June 30, 1983.

On February 2, 1983, District 33 requested Peterson to begin negotiations for a successor collective bargaining agreement. Peterson did not respond. On June 8, 1983, District 33 again asked Peterson to commence contract negotiations and Peterson did not respond. On June 29, 1983, District 33 telephoned Peterson inquiring about contract negotiations. Peterson replied that it had not yet decided whether it would sign a successor contract. District 33 called about negotiations the next day and received a similar response. Peterson and District 33 have never bargained for a successor contract.

When the PDCA contract expired, Peterson withdrew recognition from the union and stopped paying wages and benefits required under that contract. Peterson told its employees that it had gone non-union and would not complete its union projects. Its six painting employees left the company as they wished to work on union jobs. Peterson assisted these employees in finding union jobs.

Peterson hired new employees for its non-union work. It negotiated new wage and benefit packages individually with each new employee.

The Board found that Peterson's withdrawal of recognition and unilateral changes were unfair labor practices under the Act. It ordered Peterson to reinstate the terms of the PDCA contract and to bargain with the union for a replacement labor contract. It ordered that the affected employees, including both the discharged and newly hired employees, be made whole for any loss caused by Peterson's unlawful conduct.

It is well settled that if an employer unilaterally changes terms and conditions of employment following a contract's expiration, it violates the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981). It is equally well settled that an employer may not withdraw recognition from a union or deal directly with its employees absent objective evidence that the

union has lost majority support. *Pioneer Inn Association v. NLRB*, 578 F.2d 835 (9th Cir. 1978) (withdrawal of recognition); *NLRB v. Tom Johnson, Inc.*, 378 F.2d 342 (9th Cir. 1967) (direct dealing). Similarly, an employer may not condition continued employment on forsaking union membership. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Board's unfair labor practice findings are based on these principles and are affirmed.

Peterson does not deny that it acted unlawfully. Instead, it argues that the Board exceeded its authority by entering a punitive order. In particular, it contends that reinstating the provisions of the PDCA contract and applying them to employees hired after June 30, 1983 is penal, not remedial. Peterson relies principally on *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (2d Cir. 1979) to support its contention.

The Board's remedial authority is found in 29 U.S.C. Sec. 160(c). Under that section, the Board shall order a violator "to cease and desist from such unfair labor practices and to take such affirmative action . . . as will effectuate the purposes of [the Act]." *Id.* The Board's discretion to formulate an appropriate remedy is exceedingly broad and will not be disturbed on review absent a clear abuse of discretion. *General Teamsters Local 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986). Courts should not substitute their judgment for the Board's in determining how to undo the effects of unfair labor practices. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 888 (1984). "[U]nless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the Board's order will be enforced. *Virginia Power & Electric Co. v. NLRB*, 319 U.S. 533, 540 (1943).

The Board's order in this case does no more than has previously been approved by this court. We have enforced orders requiring payment of fringe benefits for newly hired employees, *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), retroactive restoration of unilaterally changed wages and benefits, *Seattle Auto Glass v. NLRB*, 669 F.2d 1332 (9th Cir. 1982), and backpay to newly hired replacement employees, *Crest Floor & Plastics, Inc. v. NLRB*, 274 NLRB No. 185, *enf'd mem.* 785 F.2d 314 (9th Cir. 1986). The Board's order is well within its authority and discretion.

Peterson's reliance on *Carpenter Sprinkler* is misplaced. In that case, the employer unilaterally changed wages and benefits only after substantial bargaining, a strike had occurred and it,

in good faith, believed that a bargaining impasse had been reached. The court concluded that, given these three factors, requiring the employer to reinstate the former terms of employment was an undue hardship and was penal, not remedial. *Carpenter Sprinkler*, 605 F.2d at 66-69.

None of these factors is present in this case. Peterson never bargained with the union. It ignored the union's repeated requests to commence negotiations. It could not reasonably believe that a bargaining impasse had been reached. No strike occurred. Peterson unilaterally withdrew recognition from the union in clear violation of its employee's statutory rights. In short, Peterson approached brazen disregard for its employee's statutory rights.

The Board's order will be enforced.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETERSON PAINTING, INC.,
Petitioner/Cross-Respondent,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
O R D E R

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

The Memoramdum disposition filed November 14, 1986 should be corrected as follows: *Page 1, line 11*, the words "Argued and" should be deleted. A corrected copy is attached.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETERSON PAINTING, INC.,
Petitioner/Cross-Respondent,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
AMENDED MEMORANDUM*

Petition for Review of National Labor Relations Board
(Submitted** November 12, 1986 - San Francisco)
DECIDED NOVEMBER 14, 1986

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

Peterson Painting, Inc. appeals a National Labor Relations Board order requiring it to reinstate certain employee benefit plans, bargain with the union and make employees whole. The Board cross-appeals for enforcement of its order. The Board found that Peterson withdrew recognition from the union, unilaterally changed terms and conditions of employment, and constructively discharged six employees, all in violation of the National Labor Relations Act (the Act), 29 U.S.C. Sec. 158(a)(1), (3) and (5). Peterson contends that the Board's order is punitive, inequitable and beyond its remedial scope.

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** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 3(f).

Peterson is a residential painting contractor. From 1971 to 1983, it was a member of the Painting and Decorators Contractors Association of Central Coast Counties (PDCA), a multi-employer bargaining group. Peterson's painting employees were represented by District Council of Painters No. 33 and were covered by the collective bargaining agreements between District 33 and the PDCA.

On December 8, 1982, Peterson timely withdrew from the PDCA. It also advised District 33 that it would terminate the PDCA contract when it expired on June 30, 1983.

On February 2, 1983, District 33 requested Peterson to begin negotiations for a successor collective bargaining agreement. Peterson did not respond. On June 8, 1983, District 33 again asked Peterson to commence contract negotiations and Peterson did not respond. On June 29, 1983, District 33 telephoned Peterson inquiring about contract negotiations. Peterson replied that it had not yet decided whether it would sign a successor contract. District 33 called about negotiations the next day and received a similar response. Peterson and District 33 have never bargained for a successor contract.

When the PDCA contract expired, Peterson withdrew recognition from the union and stopped paying wages and benefits required under that contract. Peterson told its employees that it had gone non-union and would not complete its union projects. Its six painting employees left the company as they wished to work on union jobs. Peterson assisted these employees in finding union jobs.

Peterson hired new employees for its non-union work. It negotiated new wage and benefit packages individually with each new employee.

The Board found that Peterson's withdrawal of recognition and unilateral changes were unfair labor practices under the Act. It ordered Peterson to reinstate the terms of the PDCA contract and to bargain with the union for a replacement labor contract. It ordered that the affected employees, including both the discharged and newly hired employees, be made whole for any loss caused by Peterson's unlawful conduct.

It is well settled that if an employer unilaterally changes terms and conditions of employment following a contract's expiration, it violates the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981). It is equally well settled that an employer may not withdraw recognition from a union or deal directly with its employees absent objective evidence that the

union has lost majority support. *Pioneer Inn Association v. NLRB*, 578 F.2d 835 (9th Cir. 1978) (withdrawal of recognition); *NLRB v. Tom Johnson, Inc.*, 378 F.2d 342 (9th Cir. 1967) (direct dealing). Similarly, an employer may not condition continued employment on forsaking union membership. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Board's unfair labor practice findings are based on these principles and are affirmed.

Peterson does not deny that it acted unlawfully. Instead, it argues that the Board exceeded its authority by entering a punitive order. In particular, it contends that reinstating the provisions of the PDCA contract and applying them to employees hired after June 30, 1983 is penal, not remedial. Peterson relies principally on *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (2d Cir. 1979) to support its contention.

The Board's remedial authority is found in 29 U.S.C. Sec. 160(c). Under that section, the Board shall order a violator "to cease and desist from such unfair labor practices and to take such affirmative action . . . as will effectuate the purposes of [the Act]." *Id.* The Board's discretion to formulate an appropriate remedy is exceedingly broad and will not be disturbed on review absent a clear abuse of discretion. *General Teamsters Local 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986). Courts should not substitute their judgment for the Board's in determining how to undo the effects of unfair labor practices. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 888 (1984). "[U]nless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the Board's order will be enforced. *Virginia Power & Electric Co. v. NLRB*, 319 U.S. 533, 540 (1943).

The Board's order in this case does no more than has previously been approved by this court. We have enforced orders requiring payment of fringe benefits for newly hired employees, *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), retroactive restoration of unilaterally changed wages and benefits, *Seattle Auto Glass v. NLRB*, 669 F.2d 1332 (9th Cir. 1982), and backpay to newly hired replacement employees, *Crest Floor & Plastics, Inc. v. NLRB*, 274 NLRB No. 185, *enf'd mem.* 785 F.2d 314 (9th Cir. 1986). The Board's order is well within its authority and discretion.

Peterson's reliance on *Carpenter Sprinkler* is misplaced. In that case, the employer unilaterally changed wages and benefits only after substantial bargaining, a strike had occurred and it,

in good faith, believed that a bargaining impasse had been reached. The court concluded that, given these three factors, requiring the employer to reinstate the former terms of employment was an undue hardship and was penal, not remedial. *Carpenter Sprinkler*, 605 F.2d at 66-69.

None of these factors is present in this case. Peterson never bargained with the union. It ignored the union's repeated requests to commence negotiations. It could not reasonably believe that a bargaining impasse had been reached. No strike occurred. Peterson unilaterally withdrew recognition from the union in clear violation of its employee's statutory rights. In short, Peterson approached brazen disregard for its employee's statutory rights.

The Board's order will be enforced.

277 NLRB No. 103

DeJB
D--3323
San Jose, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADE PAINTING COMPANY, INC. Case 32--CA--5842

PETERSON PAINTING, INC. Case 32--CA--5843

JOHN COSTA,
A SOLE PROPRIETORSHIP, Case 32--CA--5866
d/b/a JOHN COSTA PAINTING COMPANY

and

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

DECISION AND ORDER

On 6 December 1984 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1], and conclusions[2], and to adopt the

[1] The respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that neither Respondent Peterson nor Respondent Cascade rebutted the presumption of the Union's continuing majority status, we find it necessary to rely on the principle enunciated in *Golden State Habilitation Convalescent Center*, 224 NLRB 1618 (1976), that new employees support the union in the same ratio as those whom they have replaced.

recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Respondent Cascade Painting Company, Inc., San Jose, California, and Respondent Peterson Painting, Inc., San Jose, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph B, 1, b and reletter the subsequent paragraphs.

"b. Informing unit employees that it would become a nonunion employer."

Dated, Washington, D.C. 29 November 1985

Patricia Diaz Dennis — Member

Wilford W. Johansen — Member

Marshall B. Babson — Member

NATIONAL LABOR RELATIONS BOARD
(SEAL)

[3] The judge found that Respondent Peterson violated Sec. 8(a)(1) by informing employees it would become a nonunion employer, but the judge inadvertently omitted this finding from the Order. We correct this omission.

In "The Remedy" section of his decision, the judge recommended that Respondents be ordered to reimburse the Union for benefit funds provided for in the collective-bargaining agreement. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondents must pay any additional amounts into the fringe benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to the provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CASCADE PAINTING COMPANY, INC.

and Case 32--CA--5842

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

PETERSON PAINTING, INC.

and Case 32--CA--5843

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

JOHN COSTA, A SOLE PROPRIETOR8HIP,
d/b/a JOHN COSTA PAINTING COMPANY

and Case 32--CA--5866

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

Linda-Bytof and William O'Connor, of Oakland, CA, for the General Counsel.

La Croix, Schumb, Mateucci & Keller, by Edward R. La Croix, SR., of San Jose, CA, for Cascade Painting Company, Inc., and Peterson Painting, Inc.

John Costa, for John Costa, A Sole Proprietorship, d/b/a John Costa Painting Company.

Wylie Blunt, McBride and Jesinger, by Robert Jesinger, of San Jose, CA, for the Charging Union.

DECISION

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: These cases were heard in Campbell, California, on May 23, 24 and 25, 1984 pursuant to charges filed by District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, herein District Council or Union, and an order consolidating all three cases for hearing dated May 10, 1984. The complaints involving Respondents Cascade and Peterson were amended both prior to and at the hearing.[1] The complaints as amended in Cases 32--CA--5842 and 5843 allege in substance that Respondents Peterson and Cascade each unlawfully refused to bargain with, and withdrew recognition from, the District Council after their collective-bargaining agreements expired on June 30, 1983; that each Respondent made unilateral changes in wages and terms and conditions of employment of unit employees; that each Respondent dealt directly with its respective employees concerning wages, benefits and other terms and conditions of employment, all in violation of Section 8(a)(5); and that each Respondent constructively discharged its employees by forcing them to quit their employment rather than continue without union representation, in violation of Section 8(a)(3). Respondent Peterson is also alleged to have unlawfully informed employees that it would become nonunion, in violation of Section 8(a)(1). While admitting a number of the complaint allegations, both Respondents deny the commission of any unfair labor practices.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. A brief was filed by the General Counsel and has been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:[2]

[1] After the hearing opened, the General Counsel moved to sever Case 32--CA--5866 from the other two cases and to dismiss the complaint in that case upon the basis of a settlement agreement between the parties involved therein. The motion was granted.

[2] The General Counsel's unopposed Motion to Correct Transcript of Hearing is granted and is made a part of the record as General Counsel's Exhibit No. 24.

Findings of Fact

I. Jurisdiction

It is alleged, admitted and found that each of the Respondents has an office and place of business in San Jose, California where it is engaged in the painting of commercial and residential buildings; that during the paat 12 months each Respondent sold goods or provided services valued in excess of $50,000 to customers or business enterprises in California, which customers or business enterprises themselves met one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards; and that at all times material herein each of the Respondents has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is alleged, admitted and found that District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Setting

Respondent Cascade and Respondent Peterson are each engaged in the painting business in San Jose, California. Jack Cook is Respondent Cascade's president,[3] and Victor Peterson and Raymond Peterson, his son, are Respondent Peterson's president and vice-president respectively. Each of the companies admits that the named individuals are its respective supervisors and agents within the meaning of Section 2(11) and (13) of the Act. For a number of years both Respondents were employer-members of the Painting and Decorating Contractors Association of Central Coast Counties, Inc., herein PDCA, to whom each had given authorization to bargain collectively. By virtue of their membership in PDCA, both Respondents were

[3] Prior to mid-1981, Cascade performed its commercial work through R & T Painting, a wholly owned subsidiary. The two were merged in 1981 and have since operated as Cascade/R & T Painting Inc., herein called Cascade.

parties to a series of successive collective-bargaining agreements with the Union, the most recent being effective from July 1, 1980 through June 30, 1983. Traditionally negotiations for successor agreements have commenced in January of the contract expiration year. Due to economic conditions, however, in late 1982, the Union offered to reopen the 1980-1983 contract and commence negotiations on a successor agreement early. Upon agreement by the PDCA, negotiations commenced in December 1982 with Cook serving as chairman of the PDCA negotiation committee. Victor Peterson was also on the PDCA negotiating committee.[4] Ken Lorentzen, the Union's executive secretary, was the Union's chief negotiator. Because several employers had indicated an intent to withdraw from the PDCA and thus not be bound by the negotiations, the question arose as to when withdrawals would be effective. The Union took the position that in order to be effective, withdrawals would have to be submitted before agreement on a successor contract was reached. Accordingly, approximately 30 PDCA members notified the Union of their withdrawal from the PDCA. Cascade's letter withdrawing bargaining authority from the PDCA is dated November 19, 1982, and Peterson's is dated Deoember 8, 1982. No contention is made that the notices were not timely. An agreement amending the 1980-1983 agreement was reached on an unspecified date in December 1982 and was signed on behalf of the Union on January 4, 1983 and by the PDCA on January 11, 1983. The new agreement titled "Amendments to the Peninsula Area Painters & Decorators Agreement 1/1/83-6/30/87" incorporated the 1980-1983 agreement with certain notifications, among which was an agreement by the Union to forego a Cost of Living Adjustment of 65 cents which was due on January 1, 1983 under the 1980- 1983 contract, and an agreement to cut the wage rate of residential painters approximately $4 per hour on July 1, 1983. Those employers that gave notice of their withdrawal from the PDCA were still subject to the terms of the 1980-1983 agreement until it expired on June 30, 1983, including the 65 cents COLA due January 1, 1983, which both Respondents paid.

The complaints in 32--CA--5842 and 32--CA--5843 allege, and the record establishes, that at all material times prior to July 1, 1983, the following employees of the PDCA members constituted a stable unit appropriate for collective bargaining purposes:

[4] Both Cook and Peterson had held various positions in PDCA and participated in earlier contract negotiations with the Union.

All painters, decorators, paperhangers, building workers and sandblaster employees employed within San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

It is further alleged, admitted and proven that since at least 1971 and until July 1, 1983, the Union was recognized as the designated exclusive representative of said employees. The complaint in 32--CA--5842 further alleges that since January 13, 1983, a unit limited to Cascade's employees which encompassed the job classifications and territorial scope of the multi-employer unit, constituted a stable appropriate unit. The complaint in 32- CA--5843 alleges that since January 24, 1983, a unit limited to Peterson's employees also constituted a stable appropriate unit. The respective complaints alleged that since those dates the Union has been the designated representative of the employees in the respective single employer units; and that from February 3, 1983 until sometime in June 1983 Cascade and Peterson recognized and bargained with the Union concerning a successor agreement to cover their respective employees. It is further alleged that on or about June 30, 1983, Cascade and Peterson each constructively discharged their respective painters and on July 1 discontinued and changed terms and conditions of employment without prior notice to the Union, and since said date have refused to recognize and bargain with the Union. It is also alleged that after July 1, 1983, both Respondents dealt directly with employees regarding wages and conditions of employment.

B. Cascade and Peterson Become Nonunion Employers

As previously noted, on November 19, 1982, Cook notified the Union by letter that Cascade was withdrawing bargaining authorization from the PDCA and would no longer be bound by the 1980-1983 contract as of July 1, 1983. This message was reiterated in an identically worded letter dated January 13, 1983. Cook testified that he decided to withdraw from the PDCA "because of the attitude of labor" and that he didn't want to deal with Lorentzen because of a personality conflict. Alex Muirhead,[5] Cascade's superintendent, testified that sometime in the

[5] Muirhead was alleged initially as one of the discriminatees in Case 32--CA--5842. When it became clear on the record that he was a supervisor, the General Counsel amended paragraph 6 of the complaint in that case to delete his name.

latter part of 1982, Cook told him that he was "thinking about going non-union, not signing the agreement," and asked if Muirhead would stay with him under those circumstances. Muirhead, a long time union member, responded in the negative.[6] In early 1983, Cook also held informal employee meetings wherein he discussed the possibility of Cascade becoming a nonunion employer and questioned whether the employees would work without a union contract. He also stated that if he didn't sign a union contract, he would supply equal benefits. The evidence further shows that in a meeting with union representatives Downey and Ruybaled on June 22, 1983, Cook stated that he hadn't decided whether he "was going to stay in the Union or not," and that he had told his employees that Cascade was going nonunion, and that they could select what they wanted to do. Cook admitted having told Downey and Ruybaled that he wanted to try and operate on a nonunion basis because he didn't feel he could negotiate in a positive manner at that time; that he had a personality conflict with Lorentzen, and "as long as he [Lorentzen] was head honcho, he [Cook] wasn't going to negotiate with" the Union. It is further clear from the record that all five of Cascade's statutory employees -- Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leonard Ruiz -- all members of the Union, left Cascade's employ because Cook had decided that Cascade would operate as a nonunion employer commencing July 1, 1983. It is further clear that when the 1980-1983 contract expired, and without first notifying the Union, Cook ceased making payments to the Union trust funds, instituted a new medical plan and negotiated individually with new employees over wages.

Also as previously noted, on December 8, 1982, Victor Peterson notified the Union by letter that Peterson was withdrawing bargaining authority from the PDCA and would no longer be bound by the 1980-1983 contract as of July 1, 1983. This message was reiterated in an identically worded letter dated January 24, 1983. Victor Peterson testified that about 70 percent of Peterson's painting was performed for Shappell Industries, a large West Coast home builder; that Shappell was going to set up a dual gate system which would allow both union and nonunion contractors on a jobsite; and that if Shappell did institute the dual gate system, he intended to operate as a nonunion contrac-

[6] Cook set up an interview for him with an official of Fortune Painting, a union employer, in the latter part of May 1983, and Muirhead commenced working for that company the first of July when Cascade's contract with the Union expired.

tor. In early 1983, Victor Peterson held a meeting in his home with several employees at which time he stated he was contemplating going nonunion and if he did so, they could continue working for him if they wanted to; that they would be offered benefits comparable to what the Union gave them, including an IRA account to replace the Union's pension, and that he would treat them fairly. In May and June, Victor Peterson told various of his employees that he was not going to sign a union contract and was definitely going nonunion. When the 1980-1983 contract expired on June 30, Peterson was doing work at Moffett Field. Victor Peterson testified that the job superintendent on the Moffett Field job told him that he, Peterson, couldn't finish the job and to get a union contractor to complete it. Accordingly, Peterson made arrangements with Tom Massey, a union contractor, to complete it with Peterson's former employees, all of whom obtained referrals from the Union. It is clear from the record that all six of Peterson's statutory employees -- Joe Champlin, Bill Rose, Natividad Castilleja, Gabe Losada, Alfred Silva and Armando Silva -- all members of the Union, left Peterson's employ because Victor Peterson had decided that Peterson would operate as a nonunion employer commencing July 1, 1983. It is further clear that Peterson stopped making payments to the Union trust funds and stopped complying with any of its terms and conditions when the 1980-1983 contract expired. After that, he negotiated individually with new employees and former employees that were rehired.

Neither Cascade nor Peterson notified the Union of the proposed changes in wages and other terms and conditions of employment that were instituted on and after July 1, 1983, and neither notified the Federal Mediation and Concilliation Service nor the appropriate State agency that it was terminating the contract.

C. The Appropriate Bargaining Units

Both Cascade and Peterson admit the multi-employer unit is appropriate and that the Union represented a majority of the employees in the multi-employer unit. The law is clear that upon Cascade's and Peterson's withdrawal from that unit, there was a rebuttable presumption that the Union continued to represent a majority of their respective employees in single employer units.[7]

[7] The record established, and it was not denied, that both Respondents employed a stable work force

To withdraw recognition lawfully, either this presumption must be overcome by competent evidence that the Union in fact did not represent a majority at the time of the withdrawal, or the employer must establish on the basis of objective facts that it had a reasonable doubt as to the Union's continuing majority status. Both Casoade and Peterson failed to offer any objective considerations that it had a reasonable doubt as to the Union's continuing majority status, and the record affirmatively shows that the Union in fact represented all their unit employees through June 30, 1983. Further, the Board has ruled, with court approval, that new employees will support the Union in the same ratio as those whom they have replaced. *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center*, 224 NLRB 1618 (1976). Accordingly, it is found that at all times material herein, the Union has represented a majority of both Cascade's and Peterson's employees in separate stable and appropriate units.

D. The Union Requests Bargaining

By letters dated February 3, 1983, the Union wrote identically worded letters informing both Respondents that since they had chosen not to be bound by the new PDCA-Union agreement, each was bound by the 1980-1983 agreement until June 30, 1983, including payment of the January 1, 1983 COLA. Both letters state "Please be advised that this Council is prepared to enter into negotiations with your firm, for the purpose of negotiating a new contract." Neither employer responded to the letter.

1. Cascade

On June 8, 1983, Lorentzen sent Cascade another letter asking that it notify the Union of a time and place to begin negotiations. Not having received a response, on June 20 Fermin Ruybaled, a union business representative, called Cook and arranged a meeting for June 22. Ruybaled and Jerry Downey, another business representative, met with Cook on that date. Asked what he wanted in a contract, Cook responded that he wasn't sure and needed time to think about it but that he might be interested in a repaint agreement which is an addendum to the master contract. Cook stated that while the PDCA contract was a pretty good one, the wages and benefits were too high and he didn't like the restrictions on the "free flow" of men who

worked outside the Union's territorial jurisdiction.[8] He acknowledged having told his employees that "I hadn't decided whether I was going to stay in the Union or not." He also told the union representatives he had told employees the wages he intended to pay after the 1980-1983 contract expired, and would do his best to get them a decent health and welfare program. The meeting ended with Ruybaled stating he would contact Cook soon. The following day Ruybaled called Cook and asked if he had made up his mind about signing an agreement. Cook again stated he needed more time. Ruybaled called him again on July 5 and was told the same thing, that he needed more time and asked for 3 days. Ruybaled called him again on July 11 and was told that Cook had "been too busy, he hadn't thought about it and that... he would call us back." The charge was filed by the Union on September 2. On September 7, Cook called Ruybaled concerning the charge. On September 9, Ruybaled went to Cascade's shop to see if Cascade was employing any union members. Cook and Ruybaled had a short conversation wherein Cook expressed his feelings about Lorentzen and that he wasn't going to let the Union dictate what he could do. On September 8, Cook wrote the Board agent assigned to investigate the charge, with a copy to the Union, denying he had refused to bargain and offering to meet with the Union. On September 13, Lorentzen wrote Cook, asking that he "contact this office to establish a time and place agreeable to both parties." He also called Cook and a meeting was set up for September 28. Downey and Ruybaled accompanied Lorentzen. Cook presented the Union the following handwritten proposal:

Proposal to District Council #33

1. Establish new asscciation of employers.

   a. Independent Painting Contractors Association of Santa Clara Valley.

2. Repaint agreement open to all repaint.

[8] The contract between the Union and PDCA contains a provision that when an employer performs work outside the territorial jurisdiction of District Council No. 33, he must hire 75 percent of his employees for that project from local union hiring halls. Contracts between neighboring District Councils contain similar provisions. Cook objected to any restrictions on the use of his employees outside the Union's jurisdiction.

3. Change in number of men -- out of area (Repaint) First five from shop.

4. New work -- Ceilings & closets -- spray -- All exterior spray.

5. Option to have our own pension and medical plan.

6. Member of Association (Same as Business agent) Paid by Assoc. for new Assoc.

Cook told the union representatives he was interested in forming a nonunion association, that he wanted an agreement covering the entire Bay Area.[9] Lorentzen advised Cook that while he cou1d not negotiate for the other District Councils, he would check with them regarding the possibility of a "free flow" agreement. There was a further conversation between Cook and Lorentzen in March 1984 when Lorentzen stated he would contact the other District Councils about "free flow" of employees. In May, Lorentzen informed Cook by telephone that he would not prevent Cascade from working in other areas if he signed a contract.

2. Peterson

On June 8, 1983, Lorentzen sent Peterson another letter asking that it notify the Union of a time and place to begin negotiations. Victor Peterson did not respond. He acknowledged several conversations with Downey and Ruybaled wherein they asked his intentions with respect to signing or negotiating a contract and that he responded he didn't know what he was going to do until Shappell decided whether or not it was going to the "dual gate" system but that he was possibly going nonunion. On June 30, he informed Downey that he was going nonunion because Shappell wanted it that way, "and that he would be sending some of the men into the hall that wouldn't be working for him." In early September, Victor and Raymond Peterson met with Lorentzen and Pat Lane, another Union official. Lane asked what it would take for Peterson to sign a contract and was told that if John Moore of Shappell Industries told him to sign, that he would; that Shappell had told him he had to go nonunion. Raymond stated that the big problem was with

[9] In addition to District Council No. 33, the Bay Area encompasses District Council Nos. 8 (from San Francisco north) and 16 (the East Bay through Sacramento).

the builders who were taking nonunion bids. Asked if he felt he was negotiating, Victor Peterson responded in the negative and that he was prepared to negotiate "when I see some daylight at the end of the tunnel."

Discussion

The Act gives employees the right to bargain collectively through representatives of their own choosing. It also requires employers to recognize and bargain with a union where a majority of employees in an appropriate unit have designated or selected that union to do so. Here it was admitted that the District Council represented a majority of both of the Respondents' employees in a multi-employer unit through June 30, 1983, and as discussed earlier, neither Respondent offered any evidence to rebut the presumption that the District Council continued to represent a majority of each of the Respondents' employees in single employer units following withdrawal from multi-employer bargaining. Indeed, the record shows that all of the constructively discharged employees of both Respondents continued to be union members even after the 1980-1983 contraot expired on June 30, 1983. There is no question that the Union was, at all times material, the lawfully designated representative of the employees of both Respondents in appropriate units. Nor is there any question that both of the Respondents simply wanted no part of the Union and informed their respective employees that they were intending to become nonunion employers. This, however, was a choice open only to the employees, not to the employers. Both Respondents, however, made it clear that they would no longer operate with a union or bargain meaningfully with their employees through their duly designated collective bargaining representative. As soon as the 1980-1983 contract expired, and without advising the Union or the federal and state mediation services, both of the Respondents ceased making all payments to the Union trust funds and stopped paying wages in accordance with the contract. Both Respondents negotiated individually with employees regarding wages and other terms and conditions of employment. Their resolve to remain nonunion employers after the expiration of the 1980-1983 contract was made clear through their unilateral action, direct dealing with employees and a failure to engage in any meaningful bargaining with the Union. By embarking on such a courae of action, the Respondents evidenced a withdrawal of recognition

without ever putting in into words.

Section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees," precludes an employer from unilaterally changing terms and conditions of employment that constitute mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210 (1964). It is well settled that the terms of a collective-bargaining agreement define the status quo with respect to working conditions, and that an employer is required to maintain that status quo upon expiration of the agreement until the parties reach a new agreement or bargain to impasse. *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Neither of those conditions is present here. It is further well settled that pension, health and welfare plans provided for by contract constitute terms and conditions of employment that survive the expiration of the contract and cannot be altered without bargaining. *Buck Brown Contracting Co., Inc., et al.*, 272 NLRB No. 145 (1984); *Auto Fast Freight, Inc.*, 272 NLRB No. 88 (1984); *NLRB v. Cauthorne*, 691 F.2d at 1024-1025; *Harold W. Hinson d/b/a Henhouse Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Each of the Respondents was duty bound to continue recognizing and dealing with the Union as the bargaining agent of its unit employees while at the same time continuing in effect all terms and conditions of employment encompassed in its expired contract with the Union until it had negotiated a renewal agreement or bargained to a true impasse.

As the record evidence shows, each of the employees employed by each of the Respondents quit their jobs because their employers had announced they were going to operate thereafter as nonunion employers, and they did not want to lose the benefits they had accrued through the Union. By declaring that they were going nonunion, each of the Respondents forced its employees to either quit or forego further representation by their duly designated collective bargaining representative. A choice of this character may not validly be imposed upon employees and violates the Act. *Superior-Sprinkler Inc.*, 227 NLRB 204 (1976). Accordingly, it is found, as alleged that: (a) Cascade constructively discharged Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz; and (b) Peterson constructively disoharged Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva, both Respondents

thereby violating Section 8(a)(1) and (3) of the Act.

IV. The Remedy

Having found that each of the Respondents has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5), (3) and (1) of the Act, it will be recommended that they each be required to cease and desist therefrom, and, upon request, bargain collectively with the Union as the collective bargaining representative of all employees in their respective appropriate single employer units, and if an understanding is reached by the respective Respondents, embody such understanding in a signed agreement.

Having found that each of the Respondents has unilaterally and discriminatorily changed terms and conditions of employment following the expiration of the 1980-1983 collective-bargaining agreement with the Union, including the cessation of payments of contractually mandated contributions for certain fringe benefits as set forth in said agreement, in derogation of its ongoing obligation to bargain with the Union about any such changes, in violation of Section 8(a)(5), (3) and (1) of the Act, and having found that Cascade unlawfully terminated Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz, and that Peterson unlawfully terminated Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva, in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that each of the Respondents cease and desist therefrom and offer its respective employees immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. It is recommended that each of the Respondents rescind all unilateral changes instituted on and after July 1, 1983, reinstitute the terms and conditions of the 1980-1983 agreement, and make whole all unit employees, including those listed above and employees hired after June 30, 1983, for any loss of wages or other benefits suffered as a result of the unlawful discharges and unilateral changes, including payment into the benefit funds provided for in the expired contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal conduct, until such time as the respective Respondents negotiate in good faith with

the Union to a new agreement or to an impasse.[10] Backpay is to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Upon the basis of the above findings of fact and upon the entire record, I make the following:

Conclusions of Law

1. Cascade Painting Company, Inc., and Peterson Painting, Inc., each are employers engaged in commeroe within the meaning of Section 2(2), (6) and (7) of the Act.

2. District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, is a labor organization within the meaning of Section 2(5) of the Act.

3. All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Cascade in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, constitute a stable unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material since January 13, 1983, the Union has represented a majority of Respondent Cascade's employees in the above appropriate bargaining unit, and has been the exclusive representative of said employees for the purpose of oollective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from, and by refusing to bargain with the Union since July 1, 1983; by unilaterally discontinuing and changing existing wages and benefits of unit employees; and by dealing directly with unit employees concerning wages and benefits on and after July 1, 1983, Respondent Cascade engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

[10] I do not recommend that the Board order duplicate coverage and benefits for those discriminatees who continued to receive those contractual benefits after June 30, 1983 pursuant to employment by employers who themselves made contributions to said funds on their behalf pursuant to a collective-bargaining agreement with the Union.

6. By constructively discharging Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz on or about June 30, 1983 because of their membership in the Union, Respondent Cascade engaged in conduct violative of Section 8(a)(3) and (1) of the Act.

7. All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Peterson in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, constitute a stable unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

8. At all times material since January 24, 1983, the Union has represented a majority of Respondent Peterson's employees in the above appropriate bargaining unit, and has been the exclusive representative of said employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

9. By informing unit employees in June 1983 that it would become a nonunion employer, Respondent Peterson violated Section 8(a)(1) of the Act.

10. By withdrawing recognition from, and by refusing to bargain with the Union since July 1, 1983; by unilaterally discontinuing and changing existing wages and benefits of unit employees; and by dealing directly with unit employees concerning wages and benefits on and after July 1, 1983, Respondent Peterson engaged in conduct volative of Section 8(a)(5) and (1) of the Act.

11. By constructively discharging Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva on or about June 30, 1983 because of their membership in the Union, Respondent Petersen engaged in conduct violative of Section 8(a)(3) and (1) of the Act.

12. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I

hereby issue the following recommended:[11]

ORDER

A. Respondent Cascade, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Withdrawing recognition and refusing to bargain with the Union on and after July 1, 1983, as the exclusive representative of its employees in the appropriate unit described below; unilaterally discontinuing and changing existing wages and benefits of unit employees; and dealing directly with unit employees concerning wages and benefits on and after July 1, 1983. The appropriate bargaining unit is:

All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Cascade in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

b. Discouraging membership in the Union by constructively discharging employees because of their membership in it.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

a. Upon request, bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

b. Offer Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or

[11]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conolusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

other rights and privileges, and make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against each in the manner described above in the section entitled "The Remedy."

c. Revoke the unilateral changes instituted on and after July 1, 1983 and reinstitute the terms and conditions of the expired 1980-1983 collective-bargaining agreement with the Union.

d. Pay into the benefits funds provided for in the 1980-1983 contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal unilateral changes.

B. Respondent Peterson, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Withdrawing recognition and refusing to bargain with the Union on and after July 1, 1983, as the exclusive representative of its employees in the appropriate unit described below; unilaterally discontinuing and changing existing wages and benefits of unit employees; and dealing directly with unit employees concerning wages and benefits on and after July 1, 1983. The appropriate bargaining unit is:

All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Peterson in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

b. Discouraging membership in the Union by constructively discharging employees because of their membership in it.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

a. Upon request, bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached,

embody such understanding in a signed agreement.

b. Offer Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or other rights and privileges, and make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against each in the manner described above in the section entitled "The Remedy."

c. Revoke the unilateral changes instituted on and after July 1, 1983 and reinstitute the terms and conditions of the expired 1980-1983 collective-bargaining agreement with the Union.

d. Pay into the benefits funds provided for in the 1980-1983 contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal unilateral changes.

C. Each of the Respondents, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. In any like or related manner interfering with, restraining; or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following further affirmative action which is necessary to effectuate the policies of the Act:

a. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due employees and the amount of the sums to be paid into the benefit funds provided for in the aforementioned contract.

b. Post at their respective offices copies of the applicable

notice attached hereto and marked Appendix 1 and 2.[12] Copies of said notices, to be furnished by the Regional Director for Region 32, shall, after being duly signed by a representative of the respective Respondents, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all such places where notices to employees in the appropriate unit are customarily posted. Reasonable steps shall be taken by the respective Respondents to insure that said notices are not altered, defaced, or covered by any other material.

c. Notify the Regional Director for Region 32; in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated: December 6, 1984

[12]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX 1

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD,
AN AGENCY OF THE UNITED STATE GOVERNMENT

WE WILL NOT discourage membership in District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, or any other labor organization, by constructively discharging employees because of their union membership.

WE WILL NOT make or effect any change in the wages, hours, or other terms and conditions of employment of employees in the collective bargaining unit describe below without first giving notice to the above-named Union and affording the Union an opportunity to engage in collective bargaining with respect to any such change.

WE WILL NOT deal directly with our employees regarding wages, benefits, and working conditions in derogation of our duty to bargain with the above Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL revoke the unilateral changes in terms and conditions of employment instituted by us on and after July 1, 1983, and WE WILL reinstitute the terms and conditions of the July 1, 1980 to June 30, 1983 collective-bargaining agreement with the Union.

WE WILL, upon request, bargain collectively with District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, as the exclusive representative of all our employees in the unit described below, and if an agreement is reached, we will embody it in a signed contract. The appropriate unit is:

All painters, decorators, paperhangers, building workers and sandblasters employees employed by Respondent Cascade in San Mateo, Santa Clara, Santa Cruz, San Benito and

Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer to Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or other rights and privileges, and WE WILL make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against them.

WE WILL, in accordance with the terms of the July 1, 1980 to June 30, 1983 collective-bargaining agreement between us and the Union, pay all delinquent contributions to the fringe benefit funds contained therein, and WE WILL continue to pay such contributions until such time as we negotiate in good faith with the Union to a new agreement or to an impasse.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent provided by Section 8(a)(3) of the Act.

CASCADE PAINTING COMPANY, INC.

Dated _____ By _____
(Representative) (Title)

APPENDIX 2

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD,
AN AGENCY OF THE UNITED STATE GOVERNMENT

WE WILL NOT discourage membership in District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, or any other labor organization, by constructively discharging employees because of their union membership.

WE WILL NOT make or effect any change in the wages, hours, or other terms and conditions of employment of employees in the collective bargaining unit describe below without first giving notice to the above-named Union and affording the Union an opportunity to engage in collective bargaining with respect to any such change.

WE WILL NOT deal directly with our employees regarding wages, benefits, and working conditions in derogation of our duty to bargain with the above Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL revoke the unilateral changes in terms and conditions of employment instituted by us on and after July 1, 1983, and WE WILL reinstitute the terms and conditions of the July 1, 1980 to June 30, 1983 collective-bargaining agreement with the Union.

WE WILL, upon request, bargain collectively with District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, as the exclusive representative of all our employees in the unit described below, and if an agreement is reached, we will embody it in a signed contract. The appropriate unit is:

All painters, decorators, paperhangers, building workers and sandblasters employees employed by Respondent Peterson in San Mateo, Santa Clara, Santa Cruz, San Benito and

Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer to Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or other rights and privileges, and WE WILL make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against them.

WE WILL, in accordance with the terms of the July 1, 1980 to June 30, 1983 collective-bargaining agreement between us and the Union, pay all delinquent contributions to the fringe benefit funds contained therein, and WE WILL continue to pay such contributions until such time as we negotiate in good faith with the Union to a new agreement or to an impasse.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent provided by Section 8(a)(3) of the Act.

PETERSON PAINTING COMPANY, INC.

Dated _____ By _____
(Representative) (Title)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
PETERSON PAINTING, INC.,
Petitioner/Cross-Respondent,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
O R D E R

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

The petition for rehearing, filed on November 28, 1986, has been considered and is DENIED.